UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOHN RYAN and
THERESE RYAN,
PLAINTIFFS

v. C.A. No. 15-229-ML

DEBORAH YOST, Individually and
in her capacity as Finance Clerk of the TOWN OF
COVENTRY, ROBERT THIBEAULT, in his capacity
as Finance Director/Treasurer of the TOWN OF
COVENTRY, and THE TOWN OF COVENTRY RHODE
ISLAND,
DEFENDANTS

MEMORANDUM AND ORDER

The plaintiffs, John and Therese Ryan (the "Ryans" or "Plaintiffs"), residents of the Town of Coventry (the "Town"), have brought federal constitutional and state law claims against Town Finance Clerk Deborah Yost ("Yost"), Town Finance Director/Treasurer Robert Thibeault ("Thibeault"), and the Town (together with Yost and Thibeault, the "Defendants").

The Defendants have moved for summary judgment. For the reasons set forth below, the motion for summary judgment is GRANTED.

I. Facts[1]

Prior to the filing of this complaint, the Ryans and Yost had

[1] The facts are taken primarily from the Defendants' Statement of Undisputed Facts ("SUF"), as supplemented by additional facts asserted by the Plaintiffs. (ECF Nos. 13-2, 17).

been friends for many years. In 2005, the Ryans moved to Wisteria Drive in Coventry and became Yost's neighbors. SUF ¶1, Complaint ¶9. Therese R. works as a dispatcher for the Town police department; Yost works as a clerk in the Town Tax Assessor's office; and John R. worked for the Town as a civilian dispatcher and/or reserve officer between 1987 and 2003. SUF ¶1.

In September 2007, the Ryans requested a waiver from Town Animal Control Supervisor Carolyn Lacombe ("Lacombe") to keep a fourth dog[2] at their residential property. SUF ¶2. According to the Ryan's application letter dated September 21, 2007, the Ryans had three licensed dogs at the time and wished to add a fourth. They also represented that they knew of no conflicts with the surrounding neighbors regarding their pets. Defs.' Ex. A (ECF No. 13-3, p.2). After the request was granted on the condition that Animal Control not receive any complaints about the dogs, the Ryans began breeding their four dogs and selling the litters from their home. SUF ¶¶3, 4.

At the time, the Ryans' dogs produced two litters per year of eight to ten puppies per litter.[3] Prospective buyers would come by

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[2] Pursuant to the Town's Code of Ordinances at the time, it was unlawful to keep more than three licensed dogs at the same residence, except as permitted by the ACO. Defs.' Ex. A (ECF No. 13-3).

[3] It is undisputed that, although the price per puppy at that time was $500, the Ryans' puppies currently sell for $2,200 each. Put another way, the Ryans' self-described "hobby," Complaint ¶19

the residence to view the puppies and then pick them up at a later date. SUF ¶5.

After the relationship between the parties had soured, Yost complained to Animal Control about the activity generated by the breeding and selling of puppies. SUF ¶6. By letter dated July 8, 2009, Lacombe informed the Ryans that the Animal Control Division ("ACD") had received a complaint on July 7, 2009, alleging that the number of dogs at their residence was creating a nuisance. SUF ¶6, 7. The letter further states that ACD "must revoke the previously granted exception to have four dogs at your residence." Defs.'Ex. B (ECF No. 13-3, p. 4). Although the parties offer differing explanations, it is undisputed that the waiver remained in place. SUF ¶8.

At some point, Yost asked Lacombe's supervisor Major Schmitter about the dogs and the activity generated by breeding and selling puppies. SUF ¶9. Major Schmitter met with Lacombe and Therese R. and told her about Yost's complaint. According to Therese R., Major Schmitter told her just to get rid of the dogs. After she rejected that suggestion, he did not discuss the subject again. SUF ¶10.

Next, Yost checked the Town zoning laws and discovered that keeping more than four dogs in a residential area required a kennel license. Because the Ryans did not have a kennel license, Yost

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of breeding their dogs is yielding receipts of $35,000 to $44,000 per year.

filed a complaint with Zoning Enforcement Officer Jacob Peabody ("Peabody"). SUF ¶11. On September 8, 2010, Peabody issued a Notice of Violation to the Ryans for (1) operating a commercial business in a residential zone without receiving a zoning approval; (2) having commercial signage on their property; and (3) running a kennel in an R-20 zone. Defs.' Ex. C (ECF No. 13-3, pp. 6, 7). The Ryans were ordered to bring their property into compliance within seven days or risk a $500 fine per day, per violation. Id. It is undisputed that the Ryans did not appeal the Notice, nor did they obtain a kennel license. Instead, they decided to move while the zoning violation remained active. SUF ¶13. According to the Plaintiffs, Peabody advised them that he would not prosecute the violation if they moved. Plaintiffs' Statement of Disputed Facts ("SDF") ¶13.

By letter dated November 24, 2010, the Town Department of Planning and Development sent a Discharge of Notice of Violation (which had been recorded in the Town's Land Evidence Records) to Plaintiffs' counsel, noting that upon Plaintiffs' re-location to Western Coventry, "the current issue will be rendered moot." Defs.' Ex. D (ECF No. 13-3, pp. 9, 10).

After the Plaintiffs moved to their new residence, Town Tax Assessor Patricia Picard ("Picard") noticed an apparent discrepancy in the evaluation of Plaintiffs' property. SUF ¶¶15, 16. On May 11, 2013, after driving by the Plaintiffs' residence, Picard sent a

Notice of Increase in Assessment to Plaintiffs, informing them that their property had been reassessed to "include a half story of living area over a the [sic] portion of your home." SUF ¶ 16, Defs.' Ex. E (ECF 13-3, p. 12). The Plaintiffs promptly contacted Picard and provided her with additional information, which established that the living space of their residence was less than what was stated in the initial assessment. ¶¶17, 18. Based on this information, Picard immediately corrected the records, which reduced the assessment. ¶18.

After consulting their attorney, the Plaintiffs applied for a kennel license and a special use permit to breed and sell puppies from their new home. ¶19. On June 1, 2011, the Town Zoning Board of Review ("ZBR") granted the Plaintiffs' request for a special use permit to operate a dog kennel out of their residence. SUF ¶20. The ZBR decision notes that the primary use of the Plaintiffs' property remained residential. Defs.' Ex. F (ECF No. 13-3, pp. 14-17).

In January 2013, the Town Tax Assessor's office sent plaintiffs an Annual Return for Furniture Fixtures and Effects ("FFE Filing"). SUF ¶21, Defs.' Ex. G (ECF No. 13-3, pp. 19, 20). In her correspondence attached to the FFE filing, Picard explained that the request for FFE filing was the result of Plaintiffs' receipt of the special use permit. SUF ¶21. It is undisputed that other individuals in Town who held kennel licenses were also issued notices for the FFE filing. SUF ¶22.

The tax bills issued in July 2013 reflected that the tax rate of the Plaintiffs' property was changed to commercial rate in accordance with Rhode Island law. SUF ¶23. By letter dated October 23, 2013, the Plaintiffs appealed the 2013 assessment on their property, noting that other kennels in Western Coventry holding kennel licenses were all taxed at a residential, not a commercial rate. SUF ¶25; Defs.' Ex. I (ECF No. 13-3, pp. 24, 25).

In response, Picard informed the Plaintiffs by letter dated November 25, 2013 that their appeal was denied and that their property was taxed at the commercial rate because "residential properties containing partial commercial or business uses" pursuant to a special use permit are taxed at the commercial rate pursuant to Rhode Island General Laws. Defs.' Ex. H (ECF No. 22). Picard noted that properties the Plaintiffs had listed in their appeal as having kennel licenses "have them because they do it for a hobby," and that, unlike the Plaintiffs, those properties did not obtain a special use permit. Id. The Plaintiffs did not further appeal Picard's denial of their tax appeal. SUF ¶26. The Plaintiffs do not dispute that, during that time frame, at least three other homeowners who had obtained a special use permit for any type of commercial enterprise on their residential property also had their tax rate changed to commercial. SUF ¶24.

Although the Plaintiffs maintain that Yost discussed the reassessment of Plaintiffs' property with Picard, they agree that

the decision to change their tax rate, issue the FFE notices, and modify Plaintiffs' assessment were "solely the decision and action of [Picard]." SUF ¶27.

II. Procedural History

On June 5, 2015, the Ryans filed a complaint (the "Complaint")(ECF No. 1) against the Defendants in this Court, alleging (Count I) Deprivation of Equal Protection pursuant to 42 U.S.C § 1983; (Count (II) Intentional Infliction of Emotional Distress; (Count III) Negligent Infliction of Emotional Distress; (Count IV) Deprivation of Equal Protection pursuant to Article I, Section 2 of the Rhode Island Constitution; and (Count V) respondeat superior. Plaintiffs also seek a declaratory judgment (Count VII). Defendants filed an answer in response on June 25, 2015 (ECF No. 5)[4].

Following a lengthy discovery period, the Defendants filed a motion for summary judgment on October 11, 2016 (ECF No. 13). The Plaintiffs responded with an objection on November 2, 2016 (ECF No. 15), to which the Defendants filed a further reply on November 8, 2016 (ECF No. 16).

On November 9, 2016, this Court held a hearing on the Defendants' motion, in the course of which the parties were given an opportunity to argue their respective positions and to respond

[4] As acknowledged by Plaintiffs' counsel at the November 9, 2016 hearing, Count VI for injunctive relief was dismissed, with prejudice, by agreement of the parties.

to questions from the Court. Per request from the Court, the Defendants filed a supplemental Statement of Undisputed Facts (ECF No. 19) on November 16, 2016. Plaintiffs filed a supplemental Statement of Undisputed Facts (ECF No. 20) on December 7, 2016, to which the Defendants filed a response in opposition (ECF No. 21) on December 13, 2016.

III. Standard of Review

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party." Prescott v. Higgins, 538 F.3d 32, 40 (1st Cir. 2008) (internal quotation marks and citations omitted). "A fact is material if it has the potential of determining the outcome of the litigation." Id. (quoting Maymi v. Puerto Rico Ports Auth., 515 F.3d 20, 25 (1st Cir. 2008).

The party seeking summary judgment bears the burden of establishing the lack of a genuine issue of material fact. Merchants Ins. Co. of New Hampshire, Inc. v. U.S. Fidelity and Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998). "Once such a showing is made, 'the burden shifts to the nonmoving party, who must, with respect to each issue on which [it] would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve

that issue in [its] favor.'" Flovac, Inc. v. Airvac, Inc., 817 F.3d849, 853 (1st Cir. 2016) (quoting Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 5 (1st Cir.2010)).

The Court, in considering a motion for summary judgment, "read[s] the record in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor." Merchants Ins. Co. of New Hampshire, Inc. v. U.S. Fidelity and Guar. Co., 143 F.3d at 7 (citing Reich v. John Alden Life Ins. Co., 126 F.3d 1, 6 (1st Cir. 1997)).

IV. Discussion

A. The Complaint

Plaintiffs' claims are based on the assertions that (1) Yost "utilized her position in Coventry town government to harass [them]," Complaint ¶9; and that (2) "[a]ll Defendants, acting under color of law, deprived the Plaintiffs of Equal Protection of the Laws by [a] modifying their assessed valuation outside of the ordinary town cycle for reassessments, by [b] singling out their residential property for taxation at a commercial rate, and by [c] assessing taxes on their FFE." Complaint ¶26. The Plaintiffs also allege that Yost made "repeated malicious and unfounded allegations of zoning and/or other violations" against them, which resulted in Plaintiffs' mental anguish and suffering. Id. ¶¶31, 32. As to the Town, the Plaintiffs assert that, as Yost's employer, the Town is responsible for Yost's alleged use of her position to harass and

vex the Plaintiffs. Id. ¶39.

B. The Defendants' Motion for Summary Judgment

The Defendants assert that, as had been explained to the Plaintiffs in their tax appeal, the change to a commercial tax rate was based not on the kennel license, but on the special use permit. Although the Plaintiffs claim to be similarly situated to other kennel licensees, they ignore the fact that, unlike those other licensees, only the Plaintiffs obtained a special use permit to "breed and sell dogs." Defs.' Mem. at 10. As explained by Picard, and uncontested by the Plaintiffs, Picard routinely reviewed Zoning Board decisions to determine whether special use permits resulted in commercial activity on any part of a residential property. Id. at 11. If that were the case, Picard changed the tax rate from residential to commercial. Id. Accordingly, at the same time the Plaintiffs obtained their special use permit, three other properties had their tax rate changed to commercial for the same reason. Id.

With respect to the FFE form sent to Plaintiffs, it is undisputed that all kennel licensees in the Town were sent an FFE form as well. Id. at 13. Moreover, it was explained to the Plaintiffs that the FFE filing was a further result of the issuance of a special use permit. Id.

Regarding the modification in assessment of the Plaintiffs' property outside the three-year schedule, the Town notes that, after the Plaintiffs challenged the modification, the Tax Assessor

promptly lowered the assessment after it was established that the property description on file with the Tax Assessor's office was wrong. Id. at 13. The Defendants contend that Picard acted on discovering a discrepancy in the Plaintiffs' property information in a routine manner, by conducting a drive-by and issuing a modification. Id. at 14. The Defendants note that the unequal treatment alleged by the Defendants relates to decisions made and activities conducted by Tax Assessor Picard, not Yost herself, who had no authority or decisional power in the matter. Id. at 15-16.

Regarding Plaintiffs' claims of intentional infliction of emotional distress, the Defendants point out that the Plaintiffs have not alleged any physical ills as a result of their treatment and they further argue that the complained of conduct does not meet the "extreme and outrageous" standard necessary to establish such a claim. Id. at 18-20. Likewise, the Defendants argue that the undisputed facts in this case are insufficient to support a claim of negligent infliction of emotional distress. Id. at 21.

C. The Equal Protection Claim

The Equal Protection Clause provides that similarly situated persons must receive substantially similar treatment from their government. Tapalian v. Tusino, 377 F.3d 1, 5 (1st Cir. 2004) (citing Barrington Cove Ltd. P'ship v. R.I. Hous. and Mortgage Fin. Corp., 246 F.3d 1, 7 (1st Cir.2001)). In order to support an equal protection claim, a plaintiff must prove that "'compared with others similarly situated, [plaintiff] was selectively treated ...

based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" Tapalian v. Tusino, 377 F.3d at 5 (citation omitted); Freeman v. Town of Hudson, 714 F.3d 29, 38 (1st Cir. 2013).

Plaintiffs in this case do not claim membership in a protected class; rather, they assert that they have been impermissibly singled out for unfavorable treatment by the Town. To prove such a "class of one" claim, the Plaintiffs must establish that (1) they were intentionally treated differently from others who are similarly situated and (2) there is no rational basis for the difference in treatment. Cordi-Allen v. Conlon, 494 F.3d 245, 250 (1st Cir. 2007).

Moreover, the Plaintiffs—who carry the burden of production and persuasion to support their assertion "'must first identify and relate *specific instances* where persons *situated similarly in all relevant aspects* were treated differently.'" Id. at 251. (quoting Buchanan v. Maine, 469 F.3d 158, 178 (1st Cir.2006)) (emphasis in original). Although the determination of whether parties are similarly situated does not require "[e]xact correlation," it does require "sufficient proof on the relevant aspects of the comparison to warrant a reasonable inference of substantial similarity. Cordi-Allen v. Conlon, 494 F.3d at 252 (citing Tapalian v. Tusino, 377 F.3d at 6).

A review of the undisputed facts in this matter reveals that

the Plaintiffs were the only Coventry residents keeping and breeding dogs who held both a kennel license and a special use permit. Other kennel license holders (who were taxed at a residential rate) did not have a special use permit, whereas those residents who held a special use permit (regardless of what business they were conducting from their homes) were taxed, like the Ryans, at a commercial rate. The determination to effect a change from a residential tax rate to a commercial rate was made by Tax Assessor Picard after she routinely checked for the issuance and possession of special use permits. Accordingly, the decision to apply a commercial tax rate to the Plaintiffs' property was based on a rational basis and it resulted in equal treatment with other residents who also held a special use permit. With respect to the assessment error involving the Plaintiffs' new residence, it is undisputed that the error was already existing prior their acquisition of the house and that, as soon as the Plaintiffs brought the matter to Picard's attention, the record was corrected and the assessment was lowered. As such, the undisputed facts cannot give rise to an equal protection claim.

At the November 9, 2016 hearing on this matter, the Court requested that the parties submit additional information to clarify the extent of Yost's job responsibilities and/or any decision-making authority her job did or did not entail. In response, the Town provided the official job description of a Coventry Finance Clerk as well as a summary of Yost and Picard's description of

Yost's responsibilities which included:

> taking care of the transfer of the property in the town, administering the tax exemptions, preparing all the mapping changes, updating all the title information in the town, receiving any kind of application, form, or address change submitted by the public, answering any questions posed or responding to inquiries and preparing, on a monthly basis, a concise sales report for the public comprised of sale dates, assessments, names of the owner, sales price, and property description of recently sold properties.

Defs.' Supp. SUF at 2 (ECF No. 19).

The Plaintiffs, on their part, offered the contention that, in addition to her job description, Yost "was more involved in town actions involving the Plaintiffs." They do not contend, however, that Yost had any decision making authority; rather, they acknowledge that Picard "informed Yost that she was going to reclassify the Ryans' home as commercial." Pltfs.' Supp. Resp. at 1-2 (ECF No. 20).

In addition[5], and notwithstanding their counsel's representation at the November 9, 2016 hearing that the Ryans had applied for a special use permit on the advice of their counsel, the Plaintiffs now assert, for the first time in this litigation, that "the requirement of a special use permit was imposed upon them by Zoning Office [sic] Jacob Peabody." Id. at 2. Neither the

[5] As Defendants pointed out in their objection to Plaintiffs' supplemental SUF (ECF No. 21-1), Plaintiffs' submission far exceeded the description of Yost's scope of employment as requested by the Court.

Complaint nor Plaintiffs' Memorandum in opposition to the Defendants' motion contains such an assertion.[6] Instead, both filings state that the Town Zoning Board noted in its decision to issue the requested kennel license to the Plaintiffs that it was common in West Coventry for property owners to obtain kennel licenses without the necessity of a zoning change. Complaint ¶20 (ECF No. 1); see Pltfs.' Mem. at 5 (ECF No. 15-1).

Notwithstanding these additional allegations, the fact remains that the Ryans, after they had engaged counsel, applied for a special use permit for the express purpose of breeding and selling dogs and that the resulting change in tax assessment had a rational basis. Moreover, the commercial assessment was equally applied to all residents holding such a permit. As to the FFE form received by the Plaintiffs, it is undisputed that the form was sent to individuals with kennel licenses as well as those holding special use permits. In other words, Plaintiffs were treated exactly the same as those other residents who fell into either or both of those

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[6] For the purposes of the motion for summary judgment, the Plaintiffs' support for this late-made assertion is limited to affidavits from John Ryan (contending that Peabody insisted on a use permit and helped him fill out the application form)(ECF No. 20-1 at 1) and from the Ryans' attorney (noting that he did not specifically counsel the Ryans to apply for a special use permit)(ECF No. 20-1 at 6). Not only does Plaintiffs' assertion lack support in the record, it is inconsistent with Plaintiffs' earlier representation that "[t]his time, however, plaintiffs sought the advice of an attorney and applied for a kennel license and special use permit to breed and sell puppies from their new home." Defs.' Mem. at 5 (ECF No. 13).

categories and the issuance of an FFE form was rationally based on the presence of commercial activities.

D. Other Claims

Regarding Plaintiffs' specific assertions about Yost's conduct, their claims fall short of establishing that her behavior was so "extreme and outrageous" to give rise to a claim of intentional infliction of emotional distress. See e.g. Swerdlick v. Koch, 721 A.2d 849, 862 (R.I. 1998)(setting forth the elements of intentional infliction of emotional distress as follows:

> (1) the conduct must be intentional or in reckless disregard of the probability of causing emotional distress, (2) the conduct must be extreme and outrageous, (3) there must be a causal connection between the wrongful conduct and the emotional distress, and (4) the emotional distress in question must be severe.)

Initially, Plaintiffs were granted an exemption from the established three-dog limit, which was, however, subject to termination if the Town received any complaints about the dogs. After Yost, a closely situated neighbor of the Plaintiffs, complained about the number of dogs at their residence and the activity generated by the selling of puppies, the waiver still remained in place. A further complaint by Yost resulted in a Notice of Violation issued by Zoning Enforcement Officer Peabody, requiring the Plaintiffs, *inter alia*, to obtain a kennel license. Rather than obtain such a license or to appeal the Notice, the Plaintiffs elected to move.

There is no support for a contention that Yost's conduct

extended to actual decision making regarding the treatment which the Ryans have deemed a constitutional violation. And, although Yost's complaints about Plaintiffs' dog breeding activities were persistent, the resulting circumstances are a far cry from the facts in Rubinovitz[7], on which the Plaintiffs relied in their pleadings and at oral argument. It is noted that the Plaintiffs do not assert that either of them suffered "medically established physical symptomatology" as a result of Yost's conduct. See e.g. Vallinoto v. DiSandro, 688 A.2d 830, 838-40 (R.I. 1997)(noting that "[i]n Rhode Island, a plaintiff must prove physical symptomatology resulting from the alleged improper conduct").

With regard to Plaintiffs' claim of the negligent infliction of emotional distress, it is unclear how Plaintiffs' allegations about Yost's conduct fit into such a frame work. Plaintiffs suggest that Yost was under a duty not to engage in "coordinat[ing] enforcement or taxing actions for improper purposes motivated by malice." Pltfs.' Mem. At 18 (ECF No. 15-1). It is undisputed, however, that the actions of which the Plaintiffs complain were initiated and executed by Picard and that any complaints made against them by Yost were made in her personal, not official capacity. As such, the facts in this case fail to support a

[7] Rubinovitz v. Rogato, 60 F.3d 906, 912 (1st Cir. 1995)(concluding that there was "enough indication of a malicious orchestrated campaign causing substantial harm" to withstand a motion for summary judgment.)

negligence-based claim or a claim under *respondeat superior*.

In sum, the undisputed facts in this case do not establish that the Plaintiffs have suffered unequal treatment nor do they sufficiently support a claim for the intentional or negligent infliction of emotional harm. As such, their claims cannot withstand the Defendants' motion for summary judgment.

Conclusion

For the reasons stated herein, the Defendants' motion for summary judgment is GRANTED. The Clerk is directed to enter judgment in favor of the Defendants.

SO ORDERED.

/s/ Mary M. Lisi
Senior United States District Judge

April 3, 2017